United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7053

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

P/S

MIRIAM WINTERS, on behalf of herself and all others similarly situated,

Appellant,

-against-

ALAN D. MILLER, M.D., individually and as the Commissioner of Mental Hygiene of the State of New York; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; and DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DaCORTA, and CATHERINE DROMGOOLE, and other doctors on the staffs of Bellevue and Central Islip State Hospital whose names are unknown to plaintiff,

Appellees.

APPELLANT'S REPLY BRIEF

JONATHAN A. WEISS
PHILIP M. GASSEL
Attorneys for Appellant
Legal Services for the Elderly Poor
2095 Broadway, Room 304
New York, New York 10023
(212) 595-1340

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MIRIAM WINTERS, on behalf of herself and all others similarly situated,

Appellant,

-against-

ALAN D. MILLER, M.D., individually and as the Commissioner of Mental Hygiene of the State of New York; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; and DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DaCORTA, and CATHERINE DROMGOOLE, and other doctors on the staffs of Bellevue and Central Islip State Hospital whose names are unknown to plaintiff,

Appellees.

APPELLANT'S REPLY BRIEF

JONATHAN A. WEISS
PHILIP M. GASSEL
Attorneys for Appellant
Legal Services for the Elderly Poor
2095 Broadway, Room 304
New York, New York 10023
(212) 595-1340

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	2
"THE STATE" DEFENDANTS' BRIEF WHOLLY FAILS TO ADDRESS, LET ALONE REFUTE, APPELLANT'S SUBSTANTIAL AND DETAILED ANALYSIS OF THE ERRORS BELOW	2
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:	Page
In re Brooks Estate, 32 Ill.2d 361, 205 N.E.2d 435 (1965)	8
Erickson v. Dilgard, 44 Misc.2d 27, 252 N.Y.S.2d 705 (S.Ct., Nassau Co., 1962)	6
Schloendorf v. Society of New York Hospitals, 252 N.Y. 125	8

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-7053

MIRIAM WINTERS, on behalf of herself and all others similarly situated,

Appellant,

-against-

ALAN D. MILLER, M.D., individually and as the Commissioner of Mental Hygiene of the State of New York; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; and DOCTORS H. BLANKFELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DaCORTA, and CATHERINE DROMGOOLE, and other doctors on the staffs of Belluevue and Central Islip State Hospital whose names are unknown to plaintiff,

Appellees.

APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

This Reply Brief is submitted by Appellant Miriam Winters in reply to the Appellees' Brief submitted by the Attorney General of the State of New York on behalf of defendant physicians Alan D. Miller, Francis J. O'Neill, Catherine Dromgoole and Thomas DaCorta. Appellees apparently do not disagree with the Statement of Facts and Prior Proceedings as stated in Appellant's Brief;

thus discussion of those aspects of the case are omitted, and the Court is referred to Appellant's Brief, at 2-4.

It should be noted that the other defendants-appellees -- Doctors Blankfeld, Ollins, Kosovic and Grant -- did not file a brief with this Court, did not move to enlarge their time, and so have offered no rebuttal to the arguments raised in Appellant's Brief. All of these doctors are (or were) connected with Bellevue Hospital, where Miss Winters was initially hospitalized. Bellevue is where she was first medicated forcibly, an intramuscular injection ordered by Dr. Blankfeld on the night of her admission. She received these intramuscular injections only at Bellevue; thereafter she was forced to orally ingest Thorazine and other psychoactive drugs. It is at Bellevue, therefore, where the violation of her constitutional rights stands out in perhaps starkest relief.

ARGUMENT

THE "STATE" DEFENDANTS' BRIEF WHOLLY FAILS TO ADDRESS, LET ALONE REFUTE, APPELLANT'S SUBSTANTIAL AND DETAILED ANALYSIS OF THE ERRORS BELOW

The crux of these Appellees' argument is that "plaintiff's legal theories do not apply to the above [state] defendants "because" they testified that they were not involved and "did not have knowledge of any of the alleged acts." (State Defendants' Brief, at 40.) But it is admitted that defendants Alan Miller, M.D. (the former State Commissioner of Mental Hygiene) and Francis O'Neill, M.D. (the Director of Central Islip State Hospital) would be liable for damages if they <u>should</u> have known about Miss Winters' First Amendment right to object to treatment and then failed to

take steps which could have prevented the injury which she in fact suffered. (State Defendants' Brief, at 49.) There can be failure of administrative responsibility, of course, even if this precise plaintiff were not known to these defendants personally. It is also admitted that there was testimony on the record which established that Doctors Catherine Dromgoole and Thomas DaCorta were the physicians responsible for plaintiff at Central Islip. (State Defendants' Brief, at 38-39.) For example, Dr. Dromgoole's own notes illustrate that she was completely aware of Miss Winters' objections to treatment and that it was normal for Christian Scientists to make such objections. (See Appendix, at 175a: "She is a Christian Scientist in religion. However, she takes her medication...." (Emphasis added))

Furthermore, the State Appellees do not deny that this Court had before it the records from both hospitals, plus supplementary material, at the time it ruled in Appellant's favor in 1971. (See Appellant's Brief, at 6 and fn. 3.) These same hospital records were Appellant's evidence-in-chief at the trial. The oral testimony was primarily introduced for purposes of elaborating on those records and to provide expert testimony on the psychological devastation resulting from the constitutional tort. The transcripts clearly illustrate that no one, with the exception of Miss Winters herself, could remember the incident six years after the fact. Thus these defendants' characterization of the testimony at trial as insufficient to support liability is itself of little weight (as well as incorrect). The records themselves are sufficient to establish that Miss Winters was given medication over her repeated objections, that defendants Dromgoole and DaCorta knew that she had in fact received forced medication continually

and that these defendants had responsibility for that forced medication. If the evidence had been given its true weight, unaffected by the errors discussed in Appellant's brief, a properly chosen and properly instructed jury would have found for Miss Winters against these defendants and would have awarded substantial damages for this constitutional tort.

Nor is "the fact that she had been committed or had been argumentative or litigious" (State Defendants' Brief, at 46 (emphasis added)), relevant to Miss Winters' credibility as a witness in connection with weighing the evidence of liability and damages. If present at all, those character traits concerned past conduct which was irrelevant to the real issues in the case. The Defendants' inquiry concerning these characteristics, moreover, was beyond the scope of direct examination which might have been had on the issue in this case. These characteristics might be relevant if the case was about her being committed, but they are not relevant to her refusing treatment as a competent person.

The State Appellees do not counter or even address the legal arguments raised by Appellant regarding the plainly pertinent trial errors below. Rather, Appellees' brief concerns itself with restating either the testimony at trial or the trial court's statements and instructions to the jury.* The latter are supported with the bald assertion that they were "accurate and clear" (State Defendants' Brief, at 48).

---

*In doing so, Appellees made a number of errors. For example, on page 8 of their brief, Appellees incorrectly state that the trial court directed the verdict for defendant Miller; on page 15 of the brief, they incorrectly characterize the testimony from page 114 of the transcript; and page 34 of the brief contains a quote which cannot be found at p. 671 of the transcript as claimed.

In effect, much of the State Appellees' argument is based on the same misreading of this Court's 1971 opinion which resulted in many of the errors at trial: that Miss Winters had to start from square one and prove, besides individual liability and the extent of her damages, that her First Amendment rights were in fact violated. (See e.g., State Defendants' Brief, at 54.) But that approach to this case was an egregious error of law which was already foreclosed by this Court (see Appellant's Brief, at 5-10).*

There is not even an attempt to refute the basic argument advanced by Appellant: that inasmuch as Miss Winters was not dangerous to herself or others (there is no claim to the contrary), these Defendants had no justification -- and no "good faith" defense -- for permitting medication to be administered over her religious objections so long as they should have considered that Appellant had a right to object. A crucial issue, therefore, becomes foreseeability and the trial court's grossly inadequate instruction on that subject (see Appellant's Brief, at 28-31).

Appellees' rejoinder that there was a "dispute among psychiatrists as to involuntary treatment" at the time (State Defendants' Brief, at 51) or that these Defendants "were not constitutional lawyers" (id. at 50), falls short. All persons are charged with a basic knowledge of the constitutional rights of their fel-

---

*Appellees' assertion that "Nowhere does the judge attempt to state that administering drugs to plaintiff was permissible or would be because of her mental illness" (State Defendants' Brief, at 34) is amply discredited by the transcript (e.g. pp. 125a, 147a, 153a-154a, discussed in Appellant's Brief in the text accompanying footnotes 8, 21 and 125). These are illustrative of the trial court's fundamental malstructuring of the case.

low citizens. This area, moreover, is one in which it is reasonable to expect these doctors to have a special sensitivity beyond that of the general public. There is no doubt that, in 1968, Appellant's right to object to medication was sufficiently concretized to impose that duty of sensitivity on Appellees. As this Court noted in its 1971 opinion, the general principles of law underlying this right had long been firmly established: namely, that compulsory medical treatment against a patient's will ordinarily constitutes assault and battery, that a finding of "mental illness" does not raise even a presumption that the patient is incompetent or unable to manage his affairs, and that religious beliefs may be infringed only to prevent grave and immediate danger (446 F.2d at 68-69).*

The excuses advanced by the State Appellees as to why they did not act to recognize and protect her right -- e.g., because the state legislature was deliberating the Mental Hygiene

---

*For example, in 1962 a New York Court upheld the right of a competent patient to refuse even an emergency blood transfusion necessary to save the patient's life, Erickson v. Dilgard, 44 Misc.2d 27, 252 N.Y.S.2d 705 (S.Ct., Nassau Co., 1962), concluding that

> . it is the individual who is the subject of a medical decision who has the final say and that this must necessarily be so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desires. (Id., at 706.)

The medical necessity in that case was far more compelling than the necessity for overriding Miss Winters' "free exercise" rights to force tranquilizers on her. See also: In re Brooks Estate, 32 Ill.2d 361, 205 N.E.2d 435 (1965); Schloendorff v. Society of New York Hospitals, 211 N.Y. 125, 105 N.E. 92 (1914).

Law (see State Defendants' Brief, at 36), or because religious services were provided for Christian Science believers (see id., at 37) -- are wholly insufficient as a matter of law for betraying constitutional rights and ignoring established legal protections. Excuses for not acting in the face of actual imputed knowledge of constitutional rights, do not establish "good faith," but rather suggest negligent misconduct.

Thus the arguments in Appellant's Brief still have the same force as originally argued. She has analyzed in detail, citing relevant case authority, the numerous prejudicial errors of law which characterized the trial below, and which cumulatively, if not singly, denied her a fair trial. Besides characterizing these errors as "relatively unimportant" (State Defendants' Brief, at 42), the State Appellees offer little legal or substantive merit in opposition.

CONCLUSION

Miriam Winters again asks this Court for a chance to prove her case for damages against all of the named Defendants, in a trial which is properly conducted and is not subject to the important errors of law which she has described. She does not want a perfect trial, only a fair one.

DATED: New York, New York
May 27, 1977

Respectfully submitted,

JONATHAN A. WEISS
PHILIP M. GASSEL
Attorneys for Appellant
Legal Services for the
Elderly Poor
2095 Broadway, Room 304
New York, New York 10023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MIRIAM WINTERS, on behalf of herself and all others similarly situated,

Appellant,

-against-

ALAN D. MILLER, et al.,

Appellees.

AFFIDAVIT OF SERVICE BY MAIL

Index No. 76-7053

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LINDA JOBE, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at 229 W. 22nd, New York, N.Y. 10011.

That on the 27th day of May, 1977, deponent served the within APPELLANT'S REPLY BRIEF upon L. KEVIN SHERIDAN, Assistant Corporation and JOAN SCANNEL, Assistant Attorney General of the State of New York, the attorneys for Appellees herein, at 1656 Municipal Building, New York, New York 10007 and 2 World Trade Center, New York, New York 10047 respectively by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the care and custody of the United States Post Office Department in the State of New York.

Linda Jobe
LINDA JOBE

Sworn to before me this
27th day of May, 1977

Andrew Paul Zweben

ANDREW PAUL ZWEBEN
Notary Public State of New York
No. 31-88[illegible]
Qualified in New [illegible] County
Commission Expires March 30, 19[illegible]